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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 535

THE PIANO AND MUSICAL INSTRUMENT WORKERS UNION, LOCAL NO. 2549 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

vs.

W. W. KIMBALL COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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W. W. KIMBALL COMPANY, a Corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 30, 1964, reversing the decision of the United States District Court for the Northern District of Illinois, Eastern Division.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (App. A of Petition, S.A. 1) is reported at 221 F. Supp. 461. The opinion of the Court of Appeals for the Seventh Circuit (App. B of Petition, S.A. 10) is reported at 333 F 2d 761.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Must not a court direct arbitration of the question of reemployment rights of employees under a collective bargaining agreement which provides for arbitration of any "difference" and which requires laid off employees to be reemployed within two years of layoff, where the Company transferred the location of its plant, laid off and did not recall its employees, considered new job applicants at the relocated plant—all during the term of the contract—but did not resume actual production with the new employees at its new location until nine days following the contract's expiration.

STATUTE INVOLVED

The statutory provision involved is Section 301 (a) of the Labor Management Act of 1947, 61 Stat. 156, 29 U. S. C. 185. It provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be

brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT

This litigation involves Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185. Suit was brought by Petitioner, The Piano and Musical Workers Union, Local No. 2549, ("Union") seeking to enforce the arbitration provisions of its collective bargaining agreement with Respondent, W. W. Kimball Company ("Company").

For some time prior to October 1, 1960, Respondent was engaged in the business of manufacturing pianos and organs at its plant at Melrose Park, Illinois (App. 92).[1] On October 1, 1960, Petitioner and Respondent entered into a collective bargaining agreement (App. 12) which was scheduled to run by its terms until October 1, 1961 (App. 26, 41, 42, 82, 87, 98). On August 15, 1961, Respondent notified the Union by letter that it had decided "to discontinue operations in Melrose Park immediately" and that it would "begin immediately to lay off the employees" (App. 40). Production operations at Melrose Park ceased on August 17, 1961 (App. 83). Respondent, however, did not terminate its manufacturing operations, but, instead, transferred them

1. Pursuant to Rule 21 (3) and (4), Petitioner has filed one certified and nine additional copies of the Appendix together with all of the proceedings in the court below. References to the said Appendix and the Supplemental Appendices (attached hereto), respectively, will be indicated by the letters "App." or "S. A." followed by the page citation to the pertinent matter.

to a new plant it had constructed at French Lick, Indiana (App. 76, 84; S. A. 21).

The Collective Bargaining Agreement

The pertinent provisions of the collective bargaining agreement include the following (App. 48):

Article III—Section 2:

"6. When re-employment occurs employees will be called back to work in the order of their seniority.

* * * * *

"9. Employees who are not recalled within two (2) years following a lay-off are deemed to have lost their seniority standing."

With respect to the resolution of differences, the contract requires arbitration and provides as follows (App. 48):

"Article VIII—Section 1:

"Any difference arising from the interpretation or application of this agreement between the parties hereto, which cannot be settled directly by the parties concerned, will be referred to a board of arbitrators. . . ."

The contract, although for a term of only one year, in its Article III (App. 14-16), establishes seniority with rights to re-employment for a period of time of up to two years following layoff for all empoyees with one or more years of service with the Company. Article III provides, in part, as follows:

"Section 1. The seniority system of employment shall continue as already established based on the length of employment of each employee. It shall not apply to any employee who shall have been in the employ of the Company for a period of less than one year. Each employee who, during the life of this agreement, shall have reached one year's employment with the company shall come under the provision of the Seniority System.

"A Seniority list of employees shall be constantly maintained, containing the names of all employees of the Company who are included in the bargaining unit as defined in Article I, Section 1. This list will show the length of employment of each employee and a copy of such a list will be given to the Chief Steward or Business Agent upon request.

"Section 2. Whenever it may become necessary to lay-off employees because of lack of work, such lay-off shall be done as follows:

"1. The seniority of each employee will be established within the department and in the job in which he regularly works.

"2. Time spent in other departments on temporary transfer to work will be included when determining a worker's seniority standing.

"3. In the event that any departments are closed out, all members with one or more years seniority are to be placed in jobs in other departments, providing they can attain the ability to do the job in the time allowed by the Company.

"4. When lay-offs occur, those employees who were hired last shall be laid off first, that is, in the inverse order of their date of employment.

"5. When lay-offs occur the Company is to give the Chief Steward the names and dates of lay-offs.

"6. When re-employment occurs employees will be called back to work in order of their seniority.

"7. The Company will notify each employee in writing to report back to work and if said employee fails to report within three (3) days after mailing of the notice, the Company may re-employ the next employee in seniority standing.

"8. An employee who fails to show good cause for his failure to report within three (3) days shall lose his seniority standing.

"9. Employees who are not recalled within two (2) years following a lay-off are deemed to have lost their seniority standing.

"10. Employees shall notify the Company in writing of their proper post office address or change of address."

Petitioner relies on the foregoing seniority provisions as the contractual basis for its position with respect to the re-employment rights of the employees.

The Attempted Resolution & Demand for Arbitration

During the term of the agreement, on September 7 and 15, 1961, Petitioner met with the Respondent to discuss what should be done about the employees laid off as the result of the transfer to French Lick (App. 32-33; S.A. 12-13). Petitioner demanded that Respondent re-employ the laid off employees at its new location (App. 5, 33, 82, 83; S.A. 12, 13). The Respondent replied that it was not yet able to determine whether it would be in a position to offer the laid of employees employment at the new location (App. 83). Although actual production apparently did not begin at French Lick before October 9, 1963, as the Court of Appeals found, at least as early as September 7, 1961, Kimball was considering job applicants for French Lick (App. 82; S.A. 12) and it was advising the trade via its news letter that "On September 5 (1961) . . . . all manufacturing operations (had been) transferred to the new Kimball piano and organ plants in French Lick, Ind. . . ." (S.A. 21). On November 1 and 14, and December 14, 1961, the Union again demanded re-employment for the laid off employees, and, in addition, requested back pay until re-employment (App. 5, 33). Respondent refused to offer employment to the Melrose Park employees but asked for a list of employees who desired to

obtain employment at the Indiana plant (App. 83). It offered to furnish Petitioner with employment application blanks and suggested that Petitioner could distribute them to those employees seeking employment (App. 83, 84). Petitioner (contending that this was not a question of new employment but rather re-employment under Article III of the contract) insisted that Respondent offer employment to all of the Melrose Park employees (App. 83, 84) and that the Respondent contact the employees for such purpose in accordance with the terms of the contract (App. 83, 84).[2]

Respondent did not recall the Melrose Park employees, and, following explorations towards settlement,[3] Petitioner invoked the arbitration clause of the collective bargaining agreement and submitted its dispute with Respondent concerning the seniority clause of the agreement to arbitration (App. 6, 28, 29, 30, 34). On September 1, 1962, Respondent notified Petitioner that it refused to arbitrate its dispute (App. 6, 31, 34) and suit was filed on September 14, 1962 (App. 3).

Motions for summary judgment were filed by each side and the District Court (S.A. 1-9), upholding Petitioner's position, directed arbitration of the "difference" between the

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2. Paragraph 6 of Section 2 of Article III of the contract (App. 15) provides that when re-employment occurs "employees will be called back to work in the order of their seniority"; paragraph 7 states that the **"Company will notify each employee in writing** to report back to work and if said employee fails to report within three (3) days after mailing of the notice, the Company may re-employ the next employee in seniority standing" (App. 15). Paragraph 8 provides that "An employee who fails to show good cause for his failure to report within three (3) days shall lose his seniority standing" (App. 15). (Emphasis supplied).

3. The Defendant submitted a counter-proposal to Plaintiff's demand for relocation and back pay and offered very limited severance and termination pay for those employees (App. 6, 33-34, 70-71) which Plaintiff rejected as inadequate (App. 72).

parties "concerning the hiring practices at the French Lick Plant (arising) from the interpretation and application of Articles III, VIII and XI of the collective bargaining agreement . . ." (S.A. 8-9). The Court of Appeals reversed.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in the instant matter is in direct conflict with this Court's decision in *Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964) and with two Courts of Appeals decisions [4] issued since *Wiley*. The Seventh Circuit's divorcement from the law of arbitration as developed by this Court while unique [5] is consistent.[6] In the instant case, during the term of a collective bargaining agreement with Petitioner, the Company laid off all of its employees, refused to recall them, transferred the location of its plant and considered new job applicants for employment at the relocated plant. And this despite the fact that the one year agreement between the parties provided that laid off employees were entitled to be recalled to employment within a period of two years from the date of layoff. Confronted with a demand for arbitration (which was the method the parties had agreed upon for resolving any "difference") the Company refused to arbitrate.

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4. *Wackenhut Corporation* v. *International Union, United Plant Guard Workers of America*, 332 F. 2d 954 (C.A. 9, June 10, 1964) and *United Steelworkers of America* v. *Reliance Universal Inc. of Ohio*, —— F. 2d ——, 56 LRRM 2721 (C.A. 3, July 8, 1964).

5. See the Bureau of National Affairs' devotion of a complete "Analysis" to the instant case as an indication of the Seventh Circuit's departure and the importance of this case. "Labor Relations Reporter", July 13, 1964 issue, published by Bureau of National Affairs, Washington, D. C.

6. In *Local Union No. 12405, etc., et al.* v. *Martin Marietta Corp.*, 328 F. 2d 945 (March 3, 1964), *cert. applied for*, No. 34 Appellate docket, October Term, 1964—another plant removal, terminating of employees case—the Seventh Circuit also refused to direct arbitration, although it was aware of the *Wiley* decision, which had been cited to the Court in a petition for rehearing.

The Court of Appeals, in refusing to affirm the District Court's direction of arbitration, bottomed its decision not upon legal principles but rather upon the dictates of its behavioral disposition concerning what rights and privileges, if any, *it* would grant displaced employees. In this frame, the provisions of the contract were meaningless. What was apparently important to the Court of Appeals was that, as it stated, "a transfer of defendant's employees from a Chicag suburb to southern Indiana would be drastic, if not difficult." (S.A. 16). Although the contract required that the "Company . . . notify each employee in writing to report back to work" (App. 15) in the order of their seniority, the Court of Appeals apparently thought this an unreasonable burden to impose upon an employer; the Union, it said, should have submitted a list of employees who wanted to be recalled (S.A. 16-17). One basic "difference" between the parties was whether or not the Company was required, as the contract stated, to notify employees in writing to return to work or whether the employees must make application for employment as new employees. The Court of Appeals avoided this "difference" and not only rewrote the agreement, but, contrary to the dictates of *Wiley* and *Steelworkers* v. *American Manufacturing Company*, 363 U. S. 564, 568 (1960) also refused to confine itself "to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." Despite the clear statement in *Steelworkers* v. *American Manufacturing Company* at 568 that "The courts . . . have no business weighing the merits of the grievance (or) considering whether there is equity in a particular claim . . .", the Court of Appeals resolved the merits of the case.

But so much for the reformation of a contract by a court and its resolution of the merits. Although the Court of Appeals quotes extensively from *Wiley*, it ignores the entire thrust of the decision. In the instant case the Company resumed operations at French Lick, Indiana, nine days after the expiration of the collective bargaining agreement with Petitioner. The Court of Appeals thus concluded that there was no "difference" which arose during the term of the agreement. And this despite the fact that the court itself found that during the term of the agreement the Company ceased production operations at Melrose Park, Illinois (S. A. 11) and that on August 15, 1961, September 7, 1961 and September 15, 1961—all during the term of the agreement—the parties met and the Petitioner "demanded that laid-off employees be re-employed in the new location." (S.A. 12); and that "As early as September 7, defendant was considering job applicants for French Lick." (S.A. 12). The "difference" existing between the parties was thus quite clear and the fact that the Company did not open its actual doors at the new plant until nine days after the expiration of the contract, certainly could not affect the seniority rights of the employees which the parties had bargained would be in effect for two years following layoff. Moreover, as this Court stated in *Wiley*, at 555, "We see no reason why parties

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7. Note, additionally, the Court of Appeals substituting its judgment not only for the bargain of the parties but for the individual desire of the employee as well. It stated:

> "[I]n the case at bar a transfer from defendant's Chicago plant to its French Lick plant necessarily would involve in most cases the uprooting of a man's family from the community in which it lived and its transportation with its personal belongings, to a new community, in a home to be secured, and a readjustment of the relations of the employee and his family to new neighbors, church and social connections there, a life in a community rural in its nature, in contrast to that under which the family had lived in metropolitan Chicago." (S.A. 17)

could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." And, of course, that is precisely what happened here, because, although the collective bargaining agreement (unlimited in geographical scope) was only for a one year period, the right of recall following layoff continued for two years.[8]

In passing, it perhaps should be noted that in its discussion of *Wiley*, the Court of Appeals[9] emphasized the "continuity of operation across the change in ownership" there and the absorbtion by Wiley of the employees of the predecessor company. Since the Company did not absorb the employees here (the very thing the Union demanded and desires to arbitrate), the Court of Appeals concluded that *Wiley* is inapplicable. Obviously, this Court's discussion of the inter-relationship between Wiley and its predecessor was for the purpose of demonstrating that even though

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8. The paragraph labeled number 3 by the Court of Appeals (S.A. 18) is very difficult to comprehend because while first reciting that "there were discussions prior to October 1st (the date of the expiration of the agreement) between defendant and plaintiff's representatives about the rights of employees to be employed at the French Lick plant", it then states that at "no time during these discussions was the subject of the seniority status of Melrose Park employees discussed with respect to the availability of job opportunities at the French Lick plant . . ." nor was there a request that employees be offered employment "upon a seniority basis". Obviously, the "rights of employees" discussed prior to October 1 were the rights generated by the seniority provisions of the contract. There was no dispute as to the order of recall but the "difference" between the parties was the question of whether or not the contract required the Company to recall the employees at all.

9. As an indicium of the Court of Appeals' misinterpretation of *Wiley*, the Court of Appeals in stating that the question of arbitrability is for the arbitrator to decide (S.A. 18) cited its earlier decision of *Brass & Copper Workers Federal Labor Union* v. *American Brass Co.*, 272 F. 2d 849 (1959), a case involving pure "procedural arbitrability" which this Court cited in its footnote 12 in the *Wiley* case and tacitly overruled.

Wiley was not a signatory to the collective bargaining agreement, the arbitration provisions of the contract of the predecessor Company could be binding upon *Wiley* because of the continuity of operation. Here, the Company has neither a predecessor nor successor—it is the same Company. All that has been transferred has been the plant.

Reduced to its essentials, this case involves a collective bargaining agreement unlimited in its geographical scope and with a broad arbitration provision which provided for the arbitration of any "difference". The parties covenanted in their one year contract that seniority would be retained for two years after layoff and that employees would be recalled to work in order of seniority by the Company notifying each in writing to return without the requirement that the employees make application for recall. (It also provided that the Company could move to the next senior employee if the employee notified did not return to work within three days). Petitioner here seeks only to have an arbitrator interpret these contractual provisions and to resolve the rights of the employees under this contract. This case presents a clear cut situation without even the involvement of a successor employer or merger as was present in *Wiley*. After all of the cases of this Court clarifying the right to arbitrate differences under a collective bargaining agreement, clearly Petitioner here has such right. We submit that it is essential that certiorari be granted not only because of the instant matter but because it is becoming increasingly obvious that unless there is an expression from this Court, the Seventh Circuit may remain an island unto itself as regards the enforceability (or lack thereof) of the arbitration provisions of a collective bargaining agreement.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 24, 1964.

SUPPLEMENTAL APPENDICES

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

The Piano and Musical Instrument Workers Union, Local No. 2549 of The United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., Plaintiffs, vs. W. W. Kimball Company, Defendant.	No. 62 C 1750

OPINION AND ORDER

During that period of time between October 1, 1960, and October 1, 1961, defendant and the plaintiff Union were parties to a collective bargaining agreement covering the wages, hours, and working conditions of Kimball's production and maintenance employees. In August of 1961, Kimball decided to discontinue its Melrose Park, Illinois, operation and to transfer the same to French Lick-West Baden, Indiana. Pursuant to this decision, Kimball began the process of discharging all its employees at Melrose Park. The French Lick Plant began its operation on October 9, 1961, and on that date, nine days *after* the collective bargaining agreement had "terminated", Kimball began hiring new em-

ployees for its French Lick Plant, none of whom had been previously employed at the Melrose Park Plant.

The pertinent provisions of the collective bargaining agreement include the following:

Article III—Section 2:

"6. When re-employment occurs employees will be called back to work in the order of their seniority.

• • • •

"9. Employees who are not recalled within two (2) years following a lay-off are deemed to have lost their seniority standing."

Article VIII—Section 1:

"Any difference arising from the interpretation or application of this agreement between the parties hereto, which cannot be settled directly by the parties concerned, will be referred to a board of arbitrators. • • •"

Article XI:

"It is understood that this agreement shall continue to be in full force and effect from 12 noon, October 1, 1960, to October 1, 1961. • • •"

Plaintiffs filed a complaint on September 14, 1962, charging that defendant breached its collective bargaining agreement by refusing to hire at Kimball's plant in French Lick those employees laid off when Kimball's plant in Melrose Park was closed down.

In Count I of the complaint, the Union alleges that Kimball's refusal to hire and to grant vacation pay to certain employees created arbitrable disputes under the collective bargaining agreement and the Union demands that Kimball be compelled to submit the alleged disputes to arbitration. In Count II, the Union and the individual plaintiffs representing a class seek to obtain vacation pay for former Melrose Park employees and damages for wages allegedly lost because of Kimball's refusal to rehire the former Melrose

Park employees at the French Lick Plant. And, in Count III, the Union seeks damages for membership dues allegedly lost as a result of the same refusal to rehire.

Insofar as Counts I and II seek vacation pay, the same have been dismissed pursuant to a stipulation of the parties filed on May 28, 1963. Consequently, all three counts are narrowed to the claim that defendant breached the collective bargaining agreement by failing to rehire the former Melrose Park employees at the French Lick Plant.

Plaintiffs have filed, as to Count I, a motion for judgment on the pleadings, which has been taken as a motion for summary judgment, and defendant has filed a motion for summary judgment as to all three counts.

It appearing that this Court has jurisdiction and that there is no genuine issue as to any *material* fact, the Court may thus proceed to rule upon the respective motions and issues of law thereby presented. The basic issue simply is whether or not there is any arbitrable dispute or difference arising from the interpretation or application of the collective bargaining agreement here involved.

There is no doubt that there is a "difference" between the plaintiffs and the defendant arising from the interpretation or application of Article III, Section 2, Paragraph 6, of the collective bargaining agreement. Defendant contends, however, that this difference is neither arbitrable nor reviewable in the courts because the hirings at the French Lick Plant on October 9, 1961, which gave rise to the dispute, did not occur until after the agreement "terminated" on October 1, 1961. Consequently, it is argued, the agreement, including the seniority and arbitration provisions, was not then and is not now enforceable under the facts of this case.

It must be noted at this point that the arbitration provision in the agreement is extremely broad. It speaks not of "disputes" but of "differences", and it embraces "any" difference. Thus, assuming no "dispute" arose until the time Kimball hired new employees at its new plant, is it not true, nevertheless, that "differences" concerning the interpretation or application of Article III, Section 2, Paragraph 6, had already arisen prior to the termination of the agreement? This, at least implicitly, is what Paragraph 9 of Count I alleges, and this, it would seem, is sufficient to bring into operation even at this late date (see *Proctor & Gamble Independent Union of Port Ivory, N. Y. v. Proctor & Gamble Mfg. Co.*, 312 F. 2d 181) the broad language of the arbitration clause.

Paragraph 9 of Count I, however, alleges that the plaintiff Union and the defendant met on two occasions to "discuss and consider their differences of opinion concerning the interpretation or application of the existing collective bargaining agreement as it affected the rights of the laid off employees." Due to the nature of the allegations, a denial thereof would not place in issue the existence of a "difference", but merely the existence of a meeting. Thus, because of the lack of clarity of Paragraph 9 in pleading the existence of an arbitrable "difference", it will be assumed that no "difference" did in fact arise until October 9, 1961, when the new hirings occurred.

But even when making this assumption, it would appear that this Court, under the agreement, should order this cause to arbitration, if not as to the differences concerning the new hirings at the French Lick Plant, then on the question of whether or not this particular difference is arbitrable in the first instance. The language of the arbitration clause is

so inclusive that it even seems to contemplate arbitration of the question of arbitration.

Under Article VIII, a difference of opinion as to whether something is arbitrable is itself a "difference" arising under the agreement which should be arbitrated. More specifically, the arbitrability of the "difference" arising from the interpretation or application of Article VIII, the arbitration provision, as well as Articles III and XI involving seniority rights and the duration of the agreement, is an arbitrable "difference" under the terms of the agreement. It seems apparent that the parties have agreed to submit even this question of contract interpretation to the arbitrator.

Plaintiffs claim that the defendant has refused to arbitrate. This claim, on its face, is governed by the contract, and in particular the arbitration clause. While Article XI, at first glance, would appear to terminate the entire contract as of October 1, 1961, such a result is not at all certain in light of the language "full force and effect" and in light of the prospective operation of Article III. Is it not true that the question of the interpretation and application of the arbitration clause, as well as the interpretation of Articles III and XI, is a question for the arbitrator, where the broad language of an arbitration clause permits such a construction, as here? Was it not the arbitrator's construction of that clause and not the Court's that was bargained for? I think it was, and arbitration must be ordered on this basis alone. *Cf. United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593. But for purposes of further inquiry, we shall assume the contrary to be true for it may develop ultimately that this last determination is in error.

Thus, we shall assume that a "difference" arose on October 9, 1961, out of the new hirings at the French Lick Plant, and we shall also assume that the arbitrability of *that* difference is the issue to which this Court must properly address itself.

Article XI states that the "agreement shall continue to be in full force and effect from 12 noon, October 1, 1960, to October 1, 1961." It does not state that the entire agreement shall terminate or expire on October 1, 1961, nor does it state that rights which have accrued under the terms of the agreement shall become null and void on that date. Additional rights cannot accrue thereunder after October 1, 1961, but what of those rights which already had accrued, such as seniority rights under Article III of the agreement?

As in the case of *General Tire & Rubber Co.* v. *Local No. 512, etc.*, 191 F. Supp. 911, aff'd., 294 F. 2d 957, the dispute here between the parties is based upon a claimed violation of rights established by the collective bargaining agreement (and in particular Articles III, VIII, and XI), and involves their application and interpretation. In agreeing to arbitrate such grievances, the parties did not differentiate between grievances arising during *or after* the termination of the agreement. Plaintiffs' and defendant's obligation to arbitrate grievances was not limited only to those which might arise during the life of the agreement. And in the absence of such limitation its obligation must be deemed to include arbitration of claims for rights which accrued during the life of the agreement, but which are sought to be enforced thereafter. (See: *General Tire & Rubber Co.* v. *Local No. 512, etc., supra.*)

As in the case of pension rights and retirement benefits, seniority rights extend into the future. Are these rights, which are often referred to as "vested rights" (though perhaps improperly so), and which arise out of the terms of a

union agreement to be honored only so long as the *whole* of the agreement is enforceable? Are these rights to be held for naught thereafter? *Zdanok* v. *Glidden Company*, 288 F. 2d 99, answers these questions in the negative.

And as noted in *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 at 186, in the same sense that Zdanok applies the principle of "vested rights" and prospective enforcement to seniority, "the agreement to arbitrate is prospective and the duration to arbitrate survives the termination of the agreement." The Court went on to observe that grievances "which are based upon conditions arising *during the term of the agreement to arbitrate* are arbitrable after that term has ended." Clearly, the dispute involved in the case at bar is based upon "rights", which could be included in the all inclusive term "conditions", arising and accruing during the term of the agreement to arbitrate.

The Court, however, went on to say: "This principle has no application to grievances which arise *after the expiration* of the agreement to arbitrate. To hold that *Zdanok* suggests otherwise would be to read into that case a requirement not that accrued seniority should be credited, but that new seniority could be acquired after the expiration of the agreement." Under a literal interpretation of this language it would appear that a dispute even over seniority rights would have had to arise during the term of the agreement in order for it to be arbitrable. I doubt seriously that the Court intended this effect, for how then could anyone enforce his "vested right" of retirement payments, for example, or even seniority rights, when the enforcement of such rights and a possible resulting dispute more than likely would come to pass far in the future and long after the agreement had terminated. What the Court, I think, intended to say was that

grievances which arise after the expiration of the agreement to arbitrate, *and which are not based on rights which have accrued during the life of the agreement,* are not arbitrable under that agreement.

This interpretation would be logical for the Court in *Procter & Gamble* was concerned with disputes which arose after the termination of the collective bargaining agreement and which were not based on "vested" rights that operated prospectively beyond the termination of the contract. The Court made clear, as set out in the second sentence of the quotation in the preceding paragraph, that while *accrued* rights of seniority could be enforced, new seniority rights could not be acquired after the termination of the agreement.

Furthermore, it must be remembered that the *Procter & Gamble* case did not overrule *Zdanok.* And the Court in *Zdanok,* apparently not impressed with the fact, *if it was a fact as* suggested, that the dispute over seniority rights arose before the termination of the contract, stated at Page 103: "We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to re-employment, with seniority." This statement clearly enough contemplates a situation where a dispute over seniority rights, which are prospective in character as they were in *Zdanok,* asises *after* the termination of the contract. And the duty to arbitrate such a dispute even after the contract has terminated is explicitly recognized by the Court in *Procter & Gamble,* at Page 186.

Accordingly, it is the opinion of the Court that the "difference" between the plaintiffs and the defendant concerning the hiring practices at the Franch Lick Plant arose from the interpretation and application of Articles III, VIII, and XI

of the collective bargaining agreement and the same is arbitrable. It must be understood that this last determination and the reasoning in support thereof is mere *dicta* in the event this cause proceeds to arbitration immediately hereafter, for it is the opinion of the Court that the question of whether this particular difference is arbitrable also is subject to arbitration. Thus, the last determination is binding only in the event that a reviewing court sustains that determination after reversing the determination that the question of arbitration is itself a difference which is subject to arbitration under the terms of the agreement. Plaintiffs' motion for judgment on the pleadings as to Count I, taken as a motion for summary judgment as to Count I, is allowed and defendant's motion for summary judgment as to Count I is denied.

Defendant's motion for summary judgment as to Counts II and III is likewise denied, but a motion to dismiss said counts will be allowed, if such motion is presented, on the ground that contractual remedies have not been exhausted.

Plaintiffs shall prepare proposed findings of fact, conclusions of law, and a judgment order for presentation to the Court on September 27, 1963.

ENTER:

(s) JAMES B. PARSONS,
Judge.

DATE: September 13, 1963

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14446 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

The Piano and Musical Instrument Workers Union, Local No. 2549 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Plaintiff-Appellee v. W. W. Kimball Company, a Delaware corporation, Defendant-Appellant.	Appeal from the United States District Court of the Northern District of Illinois, Eastern Division.

June 30, 1964

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* W. W. Kimball Company, a Delaware corporation, defendant, has appealed

from an order of the district court granting summary judgment on count I of a complaint of The Piano and Musical Instrument Workers Union, Local No. 2549 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, plaintiff, under 29 U.S.C.A. § 185, being § 301 of the Labor Management Relations Act.

Relevant pleadings and exhibits affirmatively show the following facts.

Defendant was engaged in the business of manufacturing pianos and organs at its plant at Melrose Park, Illinois.[1] On October 1, 1960 it entered into a collective bargaining agreement with plaintiff, which by its terms expired October 1, 1961. On August 15, 1961, defendant notified plaintiff by letter that it had decided because of economic necessity to "discontinue operations in Melrose Park immediately" and that it would "begin immediately to lay off the employees". Production operations at Melrose Park ceased on August 17, 1961.

Defendant transferred its manufacturing operations to a plant at French Lick, Indiana. On October 9, 1961, it began hiring employees for the French Lick plant. No operations were carried on in that plant prior to that date.

The 1960 agreement provided for seniority rights for a period of two years following lay-off for those employees who had one or more years' service with the defendant. In the case of lay-off, provision was made for re-employment in the order of seniority, in which case defendant was to give written notice by mail to each employee to report back to work within three days after mailing of the notice, failing which the next employee in seniority might be re-employed. An employee who failed to show good cause for failure to report within three days would lose his seniority standing.

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1. A suburb of Chicago.

These are the principal seniority provisions upon which plaintiff relies as a contractual basis for its position with respect to the re-employment rights of the employees. The 1960 agreement also provided, in Article VIII, section 1:

> "Any difference arising from the interpretation or application of this agreement between the parties hereto, which cannot be settled directly by the parties concerned, will be referred to a board of arbitration . . . ."

While defendant's motion for summary judgment was denied, plaintiff's motion for summary judgment as to count I was granted.[2] It prayed for arbitration of the disputed issues as to the rights of laid-off employees to be "recalled" to work at the French Lick plant also their right to collect damages for lost wages and other benefits, together with costs and attorneys' fees.

On August 15, 1961, vice-president Habig of defendant, notified business agent Kearney of plaintiff, of its decision to discontinue the Melrose Park operation. On September 7, 1961, Habig and A. C. Sermersheim, one of defendant's officers, met with Kearney to discuss what should be done about the employees laid off as a result of the transfer to French Lick. Plaintiff demanded that laid-off employees be re-employed in the new location. As early as September 7, defendant was considering job applicants for French Lick. Kearney said that he had a list of 39 Melrose Park employees who wished to obtain employment at the French Lick plant. Sermersheim requested a copy of this list and Kearney said that he could give him a copy. This Kearney did not do.

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2. 221 F. Supp. 461. On defendant's motion, the district court dismissed counts II and III.

On September 15, 1961, Sermersheim and James Loftus, defendant's purchasing agent, met with Kearney and Bennett, general organizer of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. It does not appear that anything was then said or done about the copy of the list which Kearney said on September 7 he would give to Sermersheim.

No hiring was undertaken by defendant at French Lick until October 9, 1961.

On November 1, 1961, plaintiff again demanded re-employment for laid-off employees and requested back pay until re-employment. On November 14, 1961, defendant's plant manager Domark of the Melrose Park Plant and Sermersheim met with Bennett and Kearney. Bennett stated that defendant could be required to offer employment to the Melrose Park employees at French Lick. When Sermersheim asked for a list of employees who desired such employment, Kearney declined to furnish it.

On December 14, 1961, defendant asked for a list of employees who desired employment at French Lick, offering to furnish plaintiff with application blanks for those employees seeking employment there. This offer was rejected by Bennett who insisted that re-employment under Article III of the contract be offered to all Melrose Park employees and that defendant contact them for such purpose in accordance with the contract.

Such a list was never given to defendant, although in a letter dated January 15, 1962, defendant offered severance and termination pay to Melrose Park employees. Kearney refused this offer in a letter dated January 20, 1962.

No recall having taken place, plaintiff on July 30, 1962 offered to submit the "disputed issues" to arbitration, which

was refused by defendant on September 1, 1962. This suit followed on September 14, 1962.

Defendant insists that the decisive factor, under the arbitration clause, is the time at which the dispute arose. It relies on *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 2 Cir., 312 F. 2d 181 (1962), cert. denied 374 U. S. 830. It likewise relies upon *Local Union 998* v. *B. & T. Metals Co.*, 6 Cir., 315 F. 2d 432 (1963), holding that arbitration could not be compelled because a dispute over seniority arose after termination of the collective bargaining agreement.

Thus, argues defendant, an application of the *Procter & Gamble* and *B. & T. Metals* test to the facts here, requires a holding that the "difference" urged by plaintiff is not arbitrable because it arose after termination of the contract.

1. In *John Wiley & Sons, Inc.*, v. *Livingston, President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO*, 376 U. S. 543 (1964), it appears that Interscience Publishers, Inc. had a collective bargaining agreement with the union and that, while the agreement was in effect, Interscience merged with Wiley and ceased to do business as a separate entity, for genuine business reasons. A major question presented in *Wiley* was whether a corporate employer was required to arbitrate with a union under a bargaining agreement made between the union and Interscience, a corporation which later had merged with the employer.

Because of the extensive reliance by plaintiff in the case at bar upon *Wiley* (which it cites on eight pages of its brief), we shall now discuss it.

The employees involved were employed by Interscience prior to the merger with Wiley. The union sought to arbi-

trate with Wiley the question, *inter alia*, whether or not the seniority rights built up by the Interscience employees had to be accorded to such employees by Wiley not only during the term of the Interscience agreement but after its expiration. Wiley contended that it had no agreement with the union and that it was not obligated to recognize the rights of the prior Interscience employees—which rights the union contended had "vested". Wiley not only contended that it was not a party to the agreement and, therefore, not bound by it, but additionally, that, because the agreement did not embrace post-merger claims and because the claims related to a period beyond the limited term of the agreement, the union's grievances were not within the scope of the arbitration clause.

At 550, the court said:

> "• • • Therefore, although the duty to arbitrate • • • must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. • • •"

And at 551:

> "• • • The Union made its position known well before the merger and never departed from it. • • • This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement."

As to the specific issue raised in *Wiley*, whether "the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962", the court said at 554:

> "There is thus no question that had a dispute concerning any of these subjects, such as seniority rights or severance pay, arisen between the Union and Interscience prior to the merger, it would have been arbi-

trable. Wiley argues, however, that the Union's claims are plainly outside the scope of the arbitration clause: first, because the agreement did not embrace post-merger claims, and, second, because the claims relate to a period beyond the limited term of the agreement."

The court pointed out that, while in all probability the merger was not contemplated when the agreement was made in 1960, the whole litigation was underlain by the question of what was the effect of the merger on the rights of covered employees? The court said, at 555:

"• • • We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired. Of course, the Union may not use arbitration to acquire new rights against Wiley any more than it could have used arbitration to negotiate a new contract with Interscience, had the existing contract expired and renewal negotiations broken down."

However the court in *Wiley*, at 551, indicated that, for the purpose of passing upon an employer's duty to arbitrate, it might be proper to consider "relevant similarity and continuity of operation across the change in ownership", which was there evidenced "by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty." A study of *Wiley* reveals a mere absorption by Wiley of Interscience. This was accomplished by Interscience offering to its employees in its only plant, located in New York City, jobs at the Wiley plant located *in the same city*. *Livingston* v. *Wiley*, 313 F. 2d 52, 54.

In the case at bar, a transfer of defendant's employees from a Chicago suburb to southern Indiana would be drastic, if not difficult. Nevertheless the record establishes that plaintiff union, representing the employees, despite requests by defendant, never submitted to defendant a list of em-

ployees who desired to go to French Lick to work, a list which it is undisputed Kearney had. Thus we have before us a case which fails to indicate that any employee applied for employment at French Lick, based upon his seniority rights or otherwise, and that the failure of defendant to tender any jobs at French Lick to any employees based upon seniority can scarcely be urged against defendant in view of the circumstance that, absent the list which Kearney did not produce, it had no knowledge of what employees would be willing to make the transfer.

Thus in the case at bar we have not a situation where "wholesale transfer" of employees to the French Lick plant could have been made without difficulty. No one with seniority indicated to defendant the slightest desire to go.

Again reverting to *Wiley*, it is clear in that case, that, while an Interscience employee might have gotten on the Wiley payroll by reporting for duty at the Wiley plant the day after he completed his last day's work at the Interscience plant, without any movement of the place of residence of himself and family, in the case at bar a transfer from defendant's Chicago plant to its French Lick plant necessarily would involve in most cases the uprooting of a man's family from the community in which it lived and its transportation with its personal belongings, to a new community, in a home to be secured, and a readjustment of the relations of the employee and his family to new neighbors, church and social connections there, a life in a community rural in its nature, in contrast to that under which the family had lived in metropolitan Chicago. The operation at French Lick from the standpoint of the employees was relevantly dissimilar from the operation in Chicago. It is not surprising, in view of the drastic change and the lack of continuity of operation present in the case at bar, that Kearney, al-

though he said he had a list of 39 who wished to transfer, never delivered it or a copy thereof to defendant.

2. The district court determined that the question of arbitrability was for the arbitrator to decide. In so doing, it erred. *Wiley* v. *Livingston, supra; Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962); *Brass & Copper Workers-Federal Labor Union* v. *American Brass Co.*, 7 Cir., 272 F. 2d 849, 853 (1959); cert. denied 363 U. S. 845.

3. From the undisputed facts in the record in this case it appears that the "difference", to which the district court referred as the subject matter of arbitration, arose *after* October 1, 1961,[3] when the contract in this case expired. This is true even though there were discussions prior to October 1st between defendant and plaintiff's representatives about the rights of employees to be employed at the French Lick plant. At no time during these discussions was the subject of the seniority status of Melrose Park employees discussed with respect to the availability of job opportunities at the French Lick plant and at no time was there a request by any representative of plaintiff that Melrose Park employees be offered employment at the French Lick plant upon a seniority basis.

During the existence of the October 1, 1960 collective bargaining agreement, when employees at Melrose Park were laid off, such lay-offs were strictly in accordance with the provisions of said agreement.

We hold that the record fails to show that defendant during the term of the agreement in any way violated the senior-

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3. The district court, at 463, *assumed* "that a 'difference' arose on October 9, 1961, out of the new hirings at the French Lick Plant," and "that the arbitrability of *that* difference is the issue * * *." (Italicized numeral 9 supplied.)

ity rights of any of its employees as to employment at French Lick. We further hold that, during the term of the agreement, there was never any *difference* between the parties to this case in regard to seniority rights as to employment at French Lick, and that therefore there was no difference which became a proper subject for arbitration.

For these reasons, the summary judgment of the district court on count I, in favor of plaintiff, is reversed, with instructions to enter a judgment dismissing the complaint at plaintiff's costs.

REVERSED WITH INSTRUCTIONS.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

KIMBALL NEWSLETTER

EXHIBIT A OF PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND ANSWERING BRIEF IN OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

(FILED JUNE 18, 1963)

EXHIBIT A.

NEWSLETTER

Monthly Summary of Trends and Ideas from

KIMBALL

W. W. Kimball Co., Evansville, Indiana

JACK FROST SHOULD PAINT A ROSY PICTURE FOR THE PIANO INDUSTRY THIS FALL . . . healthy activity during the 1st seven months of the year and recent favorable trends indicate a strong wind-up for '61. *Unit shipments of uprights between January and July were just a slim 1.77% lower than during the same months in '60* . . . grand deliveries showed a thumping increase of 10.23% . . . total volume for the period ended up only 1.44% under the 1st seven months of last year. *NPMA committees met this month with Harvard Business School researchers for a preview of conclusions resulting from the piano marketing study*, which has been under way for more than a year . . . the final report and recommendations should be forthcoming soon . . . findings are expected to reveal improved marketing and selling methods for increasing piano sales.

FINAL CHICAGO MUSIC SHOW TALLY REVEALS ATTENDANCE WAS UP 5% over the '60 figure . . . dealer-buyer registrations topped last year by a husky 11%, according to NAMM count. *The selection of New York as the site for the '62 trade meet, over the unanimous protest of piano manufacturers and other dissenting groups, has stirred controversy over the comparative merits and demerits of both locations* . . . Chicago partisans point out that costs are much lower in the Windy City and hotel and exhibit facilities much better; that although average buyer attendance over the last 6 years has been 4,580 at New York and 4,058 at Chicago, the midwest showings always draw a more representative group of dealers. *New York advocates say both cities should be used . . . predict that many improvements in hotel facilities will greet visitors to next year's conclave.*

NEW "MUSIC MERCHANT OF THE YEAR" CREDITS ENERGY AND ENTHUSIASM AS KEYS TO SUCCESS . . . Merle J. Brandon recently got the nod as master piano and organ merchandiser in NAMMW's

KIMBALL MOVES TO INDIANA . . . EXPANDS PRODUCTION AND SERVICE FACILITIES

On September 5, the executive, sales, service and credit offices of W. W. Kimball Co. were moved from Melrose Park, Ill. to the company's new headquarters in Evansville, Ind., and all manufacturing operations transferred to the new Kimball piano and organ plants in French Lick, Ind. and Jasper, Ind.

The move sharply increases Kimball's production capabilities to keep pace with today's greatly expanded demand for Kimball decorator designed pianos and organs.

A division of The Jasper Corporation, Kimball is now closer to many raw material sources as well as the varied technical and production facilities of other Jasper Corporation plants in the area, including the recently completed Jasper Electronics Division which produces components for Kimball's new and enlarged line of institutional and home organs.

All correspondence should be addressed to: W. W. Kimball Co., P. O. Box 431, Evansville, Ind.... the new telephone number is HArrison 4-7931.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE PIANO AND MUSICAL INSTRUMENT WORKERS UNION, LOCAL NO. 2549 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

v.

W. W. KIMBALL COMPANY, a Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated October 23, 1964

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IN THE

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THE PIANO AND MUSICAL INSTRUMENT WORKERS UNION, LOCAL NO. 2549 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

THE HEART OF THE CASE

This suit was brought by petitioner ("Union") to compel respondent ("Kimball") to submit to arbitration an alleged dispute arising from Kimball's alleged refusal to hire its former Melrose Park, Illinois employees at its new plant near French Lick, Indiana.

The Court of Appeals found that no difference arose between Kimball and the Union during the term of the agreement and held that Kimball could not be compelled to arbitrate.

The Union seeks to have reviewed the fact inferences which the Court of Appeals drew from the record. The sole basis for the Union's petition is an alleged conflict between the opinion of the Court of Appeals and the decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

Kimball contends that the Court of Appeals' decision does not conflict with Wiley and that the matter which the Union seeks to have reviewed is a factual one for which a writ of certiorari should not issue.

QUESTION PRESENTED

The question is whether the opinion of the Court of Appeals conflicts with the rule of the Wiley case.

FACTS

For almost three years prior to August, 1961 Kimball had been attempting to curtail its financial losses by closing various departments at the Melrose Park plant and transferring their operations to plants in other states. Mounting losses forced it to close the Melrose Park plant and construct another at French Lick, Indiana, near its parent company's headquarters. (App. 92-97)* All manufacturing operations at the Melrose Park plant ceased on August 17, 1961 and Kimball did not again engage in such operations until after hiring commenced on October 9, 1961 at its new plant in French Lick, Indiana. (App. 83, 86; SA 11**)

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* For the convenience of the Court, the references to Kimball's Appendix, as filed with the Court of Appeals, will be designated as "App. ....".

** Supplemental Appendices attached to Union's Petition for Writ of Certiorari.

The collective agreement between Kimball and the Union terminated at midnight, September 30, 1961. (App. 26, 41-42, 82, 87, 98; SA 11)

Kimball and the Union met on September 7, 1961 to discuss the Union's demands for an extension of the agreement and the Union stated that it had a list of 39 Melrose Park employees who wanted to work at the new French Lick plant. (App. 82, 98; SA 12) At that meeting and at subsequent meetings Kimball made requests for the list but the Union refused to provide it. (App. 77, 82, 83, 98; SA 12, 13, 16-17, 18) The Union demanded that Kimball send recall notices to all former Melrose Park employees. (App. 84, 99; SA 13) This would have called for a useless act which Kimball declined to perform for the following reasons:

1. That there would not have been any jobs for a number of the employees at French Lick because, in order to update production procedures to make them economically efficient, quite a few of the operations which had taken place at the Melrose Park plant had to be discontinued or materially altered so that job classifications were not the same at French Lick. (App. 93-97; SA 17)

2. That, since the Union had such frequent contact and close rapport with the employees—and particularly since it knew the names of the 39 persons who might possibly be willing to accept jobs at French Lick—Kimball urged the Union to distribute to *all* of the Melrose Park employees job application forms to be supplied by Kimball (a request which the Union also rejected). (App. 83-84, 98-99; SA 13)

No Melrose Park employee has ever applied for work at the French Lick plant. (App. 99; SA 17) Kimball has never denied or even questioned the seniority rights of the Melrose Park employees. (App. 86, 99; SA 17) No dispute has ever existed between Kimball and the Union regarding seniority rights or regarding the hiring of employees at the French Lick plant. (App. 86, 99; SA 19)

The Union brought several charges before the National Labor Relations Board but the Board found no evidence to support the Union's charges and refused to issue a complaint against Kimball. (App. 74-78, 84) On appeal the Board's decision was affirmed by the General Counsel of the Board. (App. 79-80, 84-85)

The District Court ordered Kimball to submit to arbitration on the ground that the question of whether an arbitrable dispute exists should itself be resolved by an arbitrator. The District Court in dictum stated that an arbitrable dispute existed between Kimball and the Union. (App. 47-58) The Court of Appeals reversed the District Court and ordered that the Union's complaint be dismissed. The Court of Appeals held that the question of arbitrability should be determined by a court and that no arbitrable dispute existed between Kimball and the Union.

ARGUMENT

The Decision of the Court of Appeals is Not Unique

The Union contends that this decision of the Court of Appeals is unique and sets the Seventh Circuit apart as "an island unto itself". (Petition p. 9, 13) Such is not the case.

In Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (CA 2, 1962), cert. denied 374 U.S. 830, cited by the Court of Appeals in its opinion, it was held that disputes arising *after* the termination of a collective agreement are not subject to arbitration under the standard arbitration clause such as that found in the instant case. The Court said:

> "Grievances which are based upon conditions arising *during the term of the agreement to arbitrate* are arbitrable after that term has ended. . . . This principle has no application to grievances which arise *after the expiration* of the agreement to arbitrate.
>
> • • •
>
> "We hold, then, that no right of employees to arbitrate survived the expiration of the collective agreement." (312 F.2d 181, 186)

The same rule was followed in Local Union No. 998 v. B. & T. Metals Co., 315 F.2d 432 (CA 6, 1963).

Moreover, this doctrine was tacitly approved by this Court in Wiley, the very case which the Union argues is in conflict with the judgment rendered by the Court of Appeals. In the opinion of the Second Circuit in the Wiley case, unanimously affirmed by this Court, the Second Circuit took pains in the following language to approve the precise doctrine enunciated in Procter & Gamble:

> "As this action was commenced prior to January 31, 1962, the termination date of the agreement, our decision is entirely consistent with Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 2 Cir., 312 F.2d 181, where we held that grievances arising after the expiration of a collective bargaining agreement are not arbitrable." (Livingston v. Wiley, 313 F.2d 52, 56 (CA 2, 1963))

Thus, the opinion of the Court of Appeals espouses no new or novel legal doctrine but rather reaffirms a common sense rule which has been approved by every court which has had occasion to pass upon it.

There is No Conflict With the Rule of the Wiley Case

The Union contends that the decision of the Court of Appeals is in conflict with Wiley. (Petition p. 9) This is not so.

The Court of Appeals decided the central issue—whether the court or the arbitrator is to decide the question of arbitrability—in complete conformity to Wiley. This Court there stated that the question of arbitrability should be decided by the court (376 U.S. 543, 546)—and so did the Court of Appeals in the instant case. (SA 18)

On the question of whether an arbitrable dispute exists in this case, the Court of Appeals devoted the major portion of its opinion to an analysis of the Wiley decision and correctly found that Wiley did not compel a holding in favor of the Union.

The Dispute in Wiley

An examination of the two cases at once establishes the correctness of the Court of Appeals' conclusion. In Wiley

the issue was whether the Union had the right to compel an employer to submit to arbitration the question of the effect of the employer's merger upon the rights created by the collective agreement. The merger, and even the filing of the litigation, occurred *during the term of the agreement.* The facts dramatically revealed a clear-cut dispute between the Union and the employer as to the effect of the merger on the contract. The Union, on the one hand, contended that its rights under the contract remained unaffected by the merger, while the employer asserted that the merger freed it from all obligations under the agreement. Thus, the existence of a dispute was undeniable. This Court held that such a dispute *arising during the term of the collective agreement* was a proper subject of arbitration.

The Absence of a Dispute in this Case

In the instant case the only dispute alleged by the Union is said to involve the contractual seniority rights of the Melrose Park employees at the French Lick, Indiana plant. The record reveals, however, that no such dispute has ever arisen. Kimball at no time refused to recognize the seniority rights of the Melrose Park employees, nor did it ever disagree with the interpretation of those rights as espoused by the Union. (App. 86, 99; SA 17, 19)

Kimball has never denied employment to any Melrose Park employee at the Indiana plant. (App. 86, 99; SA 17)

No Melrose Park employee has ever requested a transfer to the Indiana plant, nor, in the words of the Court of Appeals, "indicated to defendant the slightest desire to go." (SA 17)

If a Dispute Exists in this Case, It Did Not Occur Until After the Termination of the Agreement

The only conceivable basis which the Union could advance for its contention that a dispute existed was the fact that no former Melrose Park employees were hired when Kimball began hiring at its Indiana plant. Therefore, the Union has contended that a dispute arose from Kimball's failure to hire former Melrose Park employees.

It is uncontradicted that the hiring or failure to hire did not take place at least until October 9, 1961, at which time the collective agreement had terminated. (App. 26, 41-42, 82, 83, 86, 87, 98) Both the District Court and the Court of Appeals so found. (App. 48, 50, 52; SA 11, 13, 18) Thus, even if the case is viewed most strongly in favor of the Union and if the hiring or failure to hire could have given rise to a dispute, it was only a dispute which arose *after* the termination of the agreement.

This points up the second vital distinction between the instant case and Wiley, for in Wiley there was not only a dispute but a dispute which arose *during* the term of the agreement. This Court there said:

> "District 65, Retail, Wholesale and Department Store Union, AFL-CIO, entered into a collective bargaining agreement with Interscience Publishers, Inc., a publishing firm, for a term expiring on January 31, 1962. . . . On October 2, 1961, Interscience merged with the petitioner John Wiley & Sons, Inc., another publishing firm, and ceased to do business as a separate entity.
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> "In discussions before and after the merger, the Union and Interscience (later Wiley) were unable

to agree on the effect of the merger on the collective bargaining agreement and on the rights under it of those covered employees hired by Wiley.

"Wiley . . . asserted that the merger terminated the bargaining agreement for all purposes.

"No satisfactory solution having been reached, the Union, one week before the expiration date of the Interscience bargaining agreement, commenced this action to compel arbitration." (376 U.S. 543, 544-546)

There is No Conflict With the Cases Which Followed Wiley

For the same reason that the Court of Appeals' decision does not conflict with Wiley, it also does not conflict with the decisions which have applied the rule of Wiley. The Union cites Wackenhut Corporation v. International Union, United Plant Guard Workers of America, 332 F.2d 954 (CA 9, 1964), and United Steelworkers of America v. Reliance Universal Inc. of Ohio, 335 F.2d 891 (CA 3, 1964).

In both of these cases the courts were faced with the same problem resolved by this Court in Wiley. In both cases a clear-cut dispute arose *during* the term of the agreement as to the obligations of a new employer under an existing agreement signed by the union and a former employer.

In one case the new employer entered the scene through a merger and in the other through a purchase of assets. In both cases, as in Wiley, the agreements were in existence when the new employers took over. The facts of both cases rendered them indistinguishable from Wiley and therefore the courts held that the successor employers were bound by

the arbitration provisions of the agreement. The same facts make the cases inapplicable to the instant case.

The Union's Attempt to Review the Factual Findings of the Court of Appeals

The Court of Appeals found as a fact that the dispute alleged by the Union did not occcur until after the termination of the agreement and went on to hold that that dispute was not arbitrable. The factual cornerstone of the Union's case has been the existence of an alleged dispute in regard to the seniority rights of the Melrose Park employees at Kimball's new Indiana plant. On this vital issue the Court of Appeals held directly against the Union, stating:

> "We further hold that, during the term of the agreement, there was never any *difference* between the parties to this case in regard to seniority rights as to employment at French Lick, and that therefore there was no difference which became a proper subject for arbitration." (SA 19)

It is this simple fact determination and the inferences which the Court of Appeals drew from the record which the Union seeks to have reviewed. The Court of Appeals did not set forth any new or novel legal doctrine, nor did it decide "an important question of federal law" within the provisions of Rule 19 governing considerations for review on certiorari.

Moreover, the Union's attempt to obtain review of the factual inferences drawn by the Court of Appeals from the record conflicts directly with the frequently expressed rule that a writ of certiorari will not be granted for such purposes. As stated in General Pictures Co. v. Electric Co., 304 U.S. 175 (1938):

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (304 U.S. 175, 178)

CONCLUSION

The Union's petition for a writ of certiorari should be denied.

Respectfully submitted,

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